IN THE

Supreme Court of the United States

October Term, ~~1948.~~ 1949

No. ~~574.~~ 26

UNITED STATES OF AMERICA,
Petitioner,

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING CO.,
Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Opinions Below.

The opinion of the District Court (R. 35-37) is reported *sub nom. United States v. Two Parcels of Land*, 71 F. Supp. 1001. The opinions of the Court of Appeals (R. 44-55) are reported in 170 F. 2d 752.

Question Presented.

Whether, when the United States condemns the use of leased property for a term less than the remainder of the lessee's term, with options in the taking to extend from year to year and these options are exercised, (1) after the

taking, (2) after the removal of the tenant, and (3) after the tenant has asserted a claim for compensation, and such exercised options eventually take the entire remainder of the lease, the lessee is entitled to recover the market value of its right to occupy?

Statement of Facts.

The case was presented to the District Court upon a stipulation of agreed facts (R. 28-31).

Briefly this stipulation set forth: that the United States had filed a petition to condemn a property occupied by Westinghouse as a long term tenant; that the condemnation was for the period Feb. 18, 1943-June 30, 1943 "renewable for additional yearly periods . . . at the election of the Secretary of War"; that immediate possession was granted; that the lease of Westinghouse did not expire until October 30, 1944; that the United States subsequently on May 1, 1943 renewed its taking to June 30, 1944, and on May 25, 1944 renewed to June 30, 1945; that the cost to Westinghouse of removing its property was $25,600; that "as of February 18, 1942 the market value of so much of the building in question as was occupied by the Westinghouse Electric Corporation as a lessee, on a sub-lease which would be given by it as a long term tenant to a temporary occupier over and above the rent reserved under its lease was the sum of Twenty Five Thousand Six Hundred and 00/100 Dollars ($25,600.00), being its removal cost to make the property available to the temporary occupier; and that said sum was the value of the occupancy of Westinghouse Electric Corporation under its said lease." The preceding quotation from the stipulation (R. 30) was what it was agreed the testimony of Westinghouse would be at formal

trial, the admissibility of which was not conceded by the Government in the stipulation.

Upon the stipulation the District Court entered a finding in favor of Westinghouse in the sum of Twenty Five Thousand Six Hundred Dollars ($25,600.00) (R. 37) and upon appeal by the Governme t this judgment was affirmed (R. 44).

Westinghouse contends that the judgment was properly entered and submits that the petition for writ of certiorari should be denied.

Argument.

The Finding Below Was Proper.

In ascertaining the just compensation to be paid on condemnation of a right of temporary occupancy of leased space, where the original taking does not exhaust the lease, the value of such occupancy is to be ascertained not by treating the space as empty space to be leased for a long term but by what would be the market rental value of such space on a lease by the long-term lessee to a temporary tenant, as bearing on which the removal costs of the lessee may be shown. *United States v. General Motors Corp.*, 323 U. S. 373, 382-383. This decision it is submitted, is controlling in the instant case.

The United States has argued that because the subsequent exercise of the options in its taking eventually exhausted the term of Westinghouse's lease the *General Motors* case is inapplicable and *United States v. Petty Motor Co.*, 327 U. S. 372 is controlling. The right to just compensation in the instant case as in every such case arose on the date of the taking. Just compensation is mar-

ket value on the date of taking not a value to be found by events transpiring at some future date the occurrence of which cannot be foretold on the date of taking. As of the date of this taking, measured by the then known facts, Westinghouse was under an obligation to the landlord for that portion of the lease not taken; and, as pointed out in the *General Motors* case, because of that continuing obligation the value of the lessee's rights which were taken was affected by the cost of the temporary removal. In the *Petty Motor* case the original taking exhausted the entire terms of all the tenants, the tenants were under no further obligation to the landlord, even though the United States did have the right to surrender the premises during the original term.

Westinghouse contends that the measure of damages should be and are determined by the state of facts existing at the time of the taking; that when the original term taken by the Government carves out only a portion of the lessee's leasehold then the rule of the *General Motors* case applies. The lessee must seek a new location mindful of the fact that he is obligated to return to the original premises when the Government's term expires. In making his future plans such a lessee cannot contemplate that the Government will exercise its options of renewal so as to free him from his continuing obligation to the landlord. To hold that the measure of damages is determined by the state of facts existing at time of trial or at the time the Government quits the premises is to disregard this crucial element which was the basis of the *General Motors* decision. Such a holding could mean that of two tenants in a single building holding identical leases one would be permitted to prove his moving costs as an element of the value of his occupancy because his case happened to be tried before the option exhausting the term was exercised; the other tenant would be barred

from such proof because his case happened to be tried after such option was exercised. It should be observed that in the *General Motors* case the Government's lease was "renewable for additional yearly periods thereafter . . . at the election of the Secretary of War"; so that these such renewals might have eventually exhausted the lease but the Court did not consider this fact as having any bearing upon the measure of damages.

The United States has stated that in the instant case the appellee does not claim the right to be compensated for the rent reserved or that the premises have a rental value in excess of the rent reserved. If by this the Government means that Westinghouse does not claim that the market value of the empty warehouse space was in excess of the price set in these proceedings then the statement is true; however, as pointed out in the above quotation from the stipulation of agreed facts, Westinghouse does not concede that such figure represents the market value of its occupancy at the time of the taking. The market value of Westinghouse's occupancy was the rent reserved plus the sum of $25,600.00, being its removal cost to make the property available to the temporary occupier.

The *General Motors* and the *Petty Motor* cases make a clear distinction: if at the time of the taking the entire term is taken, evidence of removal costs is inadmissible (*Petty Motor* case); if the taking is of only a portion of the leasehold then such evidence is admissible (*General Motors* case). The effect upon the tenant is the basis of this distinction; in the first case he is under no continuing obligation to the landlord, in the second case he is; in the first case his damage is simply the difference in market value of his space as measured by the difference between the market value at the time of the taking and the rent reserved

in his lease; in the second case there is added to this damage the additional element that he must face immediate removal costs and still remain obligated to the landlord for the balance of the term. In such case he must contemplate moving back after the temporary occupier vacates and must therefore expect to face moving costs a second time. A lessee in the second case would not voluntarily sublet for the same price as he would in the first case and therefore the measure of just compensation is not the same as the *General Motors* and *Petty Motor* cases have held.

The position of the United States, it is submitted, confuses "condemnation" and "occupancy". It is the condemnation proceedings that fix the right to damages. In the *General Motors* case the condemnation was for less than the leasehold period; however the Government might have exercised its options so as to exhaust the lease, yet the Court did not hold that the lessee must await the eventual termination of the United States' occupancy before being awarded damages for the taking. The United States in the instant case took only the period from Feb. 18, 1943 to June 30, 1943; that taking fixed the lessee's right to just compensation just as it did in the *General Motors* case regardless of what occupancy the Government later enjoyed through exercising options. On Feb. 18, 1943 Westinghouse had no certainty that it would not have to resume its lease on June 30, 1943. Would the argument of the United States be the same if instead of having two successive options to exercise to exhaust Westinghouse's lease it had made two new takings for the additional terms? Yet that is all that was accomplished by the exercise of the options. It is submitted that the only proof required of the claimant on the point of its being compelled to resume its obligations under the lease was the proof which was stipulated: that the lease did not expire until Oct. 30, 1944 and

the taking was for a period ending June 30, 1943. The value of the lessee's occupancy at the date of the taking is the question in issue, to be determined as the facts then existed.

The lease in question is attached to the stipulation (R. 32-35) and is specifically made a part of it (R. 29). It speaks for itself and is proof that the lessee was bound until October 31, 1944 and would have been compelled to resume its obligations under the lease if the Government had not exercised its options for the two additional yearly periods. In certain instances (R. 33) the lease gave the *lessor* the right to terminate the lease. One of these instances was if "*the estate* hereby created shall be taken . . . by other process of law". However, the estate of the lessee was not taken by the original condemnation proceedings, which is the time when the respondent asserts it suffered damage —only a portion of the estate was then taken. Furthermore there is no showing by the Government (which had the burden to rebut the *prima facie* case of the respondent's obligation to resume its lease obligations made out by the introduction of the lease in the stipulation) that the lessor ever exercised or attempted to exercise any right to terminate the lease. And in fact the lessor never did.

There is a very substantial practical difference between whether the duration of the Government's term depends upon an option to cancel as in the *Petty* case or upon an option to renew as in the instant case. That practical difference is that the *taking* in the *Petty* situation exhausts all of the tenant's term and frees him forthwith from any obligation under his lease; in the *General Motors* case the *taking* did not exhaust the term, nor did it in the instant case. That fact is the precise basis for the special rule of damages propounded by the *General Motors* case. In both

the *Petty* case and the *General Motors* case the Court considered the situation as it existed at the time of the taking, and did not inquire as to whether the options to cancel may have been exercised in the *Petty* case or whether sufficient options to renew might have been exercised in the *General Motors* case to exhaust the term. In fact, as evidenced by the footnote in the *General Motors* decision (at p. 376), the Court considered an option of renewal identical with the one in the instant case, noted that the Court below had retained jurisdiction for the ascertainment of further compensation and said: "We do not understand that these facts alter the question before us. The case now presented involves only the original taking for one year. If on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be awarded." This was said by this Court on January 8, 1945; the *General Motors* lease had then but three years to run; it was on that date very probable that the Government might require this space "at the election of the Secretary of War"; yet this Court properly did not consider such facts and decided that the method of taking adopted by the Government required a new rule of damages in order that the tenant's right to just compensation might be preserved. It was a salutary decision and should be preserved. The instant case involves not the extension of the decision but its very preservation. As of the date of the condemnation proceedings the facts in the instant case and in the *General Motors* case were identical: in each there had been a taking of a portion of a long term lease with rights to renew which might in each case exhaust the lease. At the date of trial the facts vary; in the *General Motors* case the options had not yet been exercised, in the instant case they had. In asking this Court to review this case and upset the decision below, the Government is in

effect requesting this Court to approve a method by which the Government may circumvent the rule of this Court in the *General Motors* case by the expedient of delaying trial of condemnation suits and payment of just compensation until such time as it chooses to decide that it no longer wants property it has taken on a year to year basis "at the election of" some individual within the Government. Such a result would be the end of the Fifth Amendment so far as it guarantees just compensation for private property taken by the Government.

Fair, just and reasonable compensation has always been the measure of damages in the condemnation cases, and always that value has been the value as of the time of taking. The *General Motors* decision detecting a method by which the Government might avoid such payment in a case identical to the instant case checked the potential abuse of the power of eminent domain. The United States has here advanced no argument for overruling or circumventing that decision.

Conclusion.

It is, therefore, respectfully submitted that the judgment below was correct and that the petition for writ of certiorari should be denied.

WESTINGHOUSE ELECTRIC CORPORATION,
(formerly WESTINGHOUSE ELECTRIC &
MANUFACTURING CO.)
By MILTON J. DONOVAN,
its Attorney.